JD–67–05
Cuyahoga Falls, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ACCURIDE-CUYAHOGA FALLS

and

GREGORY HUBBARD, an Individual — Case 6-CA-34308 (formerly 8-CA-35286)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, UAW REGION 2-B — Case 6-CA-34418

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for the Respondent.

DECISION

Statement of the case

IRA SANDRON, Administrative Law Judge. The complaint alleges that Accuride-Cuyahoga Falls (the Respondent or Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by terminating Gregory Hubbard on August 13, 2004,[1] and, through Wayne Williams, second shift production coordinator, committed independent violations of Section 8(a)(1) in June.

Pursuant to notice, I conducted a trial in Cleveland, Ohio, on May 24 and 25, 2005, at which the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[2] The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

The primary issue is whether the Respondent discharged Hubbard because he violated company policy by coming to work intoxicated while he was on a performance improvement plan (PIP), or whether the Respondent's real motivation was Hubbard's support for the International Union, United Automobile, Aerospace and Agricultural Implement Workers (the Union).

[1] All dates hereinafter occurred in 2004 unless otherwise specified.

[2] The General Counsel's unopposed motion to correct the transcript, dated June 29, 2005, is granted and received in evidence as GC Exh. 22.

The independent 8(a)(1) allegations are that Supervisor Williams:

1) On June 15 and on about June 21, threatened employees that union supporters would be discharged.

2) On about June 8, threatened employees that their union organizing efforts were futile.

Employees Dan and Harry Saunier, who are brothers, were the General Counsel's witnesses in support of these 8(a)(1) allegations.

In addition to Williams, the following agents of the Respondent (with their titles at times material) testified: Bruce Henderson, plant manager; Pat Wolfe, acting human resources (HR) manager; Clement Ferraro, production supervisor and Williams' superior; and Anthony Tomsello, environmental, health and safety (EHS) coordinator.

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following.

Findings of fact

The Respondent is a corporation with an office and place of business in Cuyahoga Falls, Ohio (the facility), engaged in the manufacture and sale of aluminum wheels.

Each new employee is normally given a 60–day, 90–day, and 6–month performance review to determine the employee's fit with the job and the Company. These reviews are used to document individual performance feedback, clarify performance expectations, and identify individual performance strengths and opportunities for improvement. Employees are graded on a rating scale, with three categories: "far exceeds," "generally meets," and "fails to meet" (FM) position requirements.

As stated in the handbook given to all new employees,[3] employees who receive FM reviews are subject to being placed on a PIP, in which solutions are offered to increase worker productivity in specific areas of job performance. If an employee does not make significant improvement while on a PIP, he or she may be discharged. The Company does not automatically place an employee who receives a poor performance review on a PIP; the handbook states that there are situations in which immediate termination is warranted, and in 2004, several employees who received negative reviews from Williams were terminated without being afford such an opportunity to improve.

As also stated in the handbook, the Company maintains a stringent policy regarding drugs and alcohol in the workplace.[4] Employees must take a drug/alcohol test when hired and are subject to random testing throughout the duration of their employment. An employee may also be required to undergo testing if there is a reasonable suspicion that he or she is under the influence of drugs or alcohol. Having an alcohol level of .02 or greater, but less than .04, will

[3] GC Exh. 3.

[4] GC Exh. 2. Although raised at the hearing and in post-hearing filings, I deem irrelevant the State of Ohio's blood level standard for driving under the influence.

automatically result in the employee's suspension until his or her next regularly scheduled duty period but can also subject the employee to other discipline up to and including termination. All employees having an alcohol concentration of .02 or greater, if not discharged, must fully participate in the Company's employee assistance program (EAP) and/or in other approved counseling.

The handbook also sets out the methods used to ensure that drugs and alcohol do not enter the workplace. The Company expressly reserves the right to conduct unannounced searches of employee property and possessions, including automobiles, lockers, lunches, briefcases, purses, and packages. Any violation of this policy or failure to comply or cooperate fully with this policy subjects an employee to disciplinary action up to and including discharge.

In 2004, at least three employees were terminated as the result of testing positive for drugs. At least one was suspended pending investigation following a positive test result for alcohol.[5]

Union activities at the facility

The Union's organizing campaign at the facility started in May. Dan and Harry Saunier were actively involved in the organizing drive. They were responsible for getting union cards signed, educating workers on the Union, and passing out pamphlets. Dan Saunier was also the Union's observer at the election conducted on June 15, which resulted in the Union being certified as the collective-bargaining representative of a bargaining unit of the Respondent's employees.[6] Following the election, the Union notified the Respondent that Dan Saunier was the chairperson of the Union's bargaining committee and that Rick Rose and Karl Labbe were committee members.[7]

Management and supervisors testified that they were well aware of the Saunier brothers' union activities prior to the election, with Dan Saunier being considered the lead organizer. Supervisors also observed Rose wearing a "vote yes" union hat. The Respondent still employs all three. Harry Saunier received a positive evaluation in May.

As to Hubbard, he testified that he was vocal in his support of the Union, solicited employees to sign authorization cards, and acted as a liaison between the Union and younger African-American workers who were unsure of the union voting process. Dan Saunier also testified that Hubbard engaged in active support for the Union. The Respondent, on the other hand, denies knowledge that he engaged in any union activities.

Hubbard's employment

For a myriad of reasons, Hubbard was not a reliable witness. First of all, his testimony was often vague. He rarely gave specifics when it came to dates and tended to have a generalized, rather than specific, recall of conversations. At times, he seemed clearly evasive;

[5] See GC Exh. 7. The employee was subsequently allowed to return to work and participate in an EAP, based on his "26 years of service, good attendance and safety record." He cannot be considered to be an employee similarly situated to Hubbard, who was employed for less than 8 months.

[6] GC Exh. 14. The unit consists of approximately 115 full-time hourly production, maintenance, and logistics employees. See GC Exh. 13.

[7] GC Exh. 15.

for example, he never gave a direct answer, despite my repeated efforts to elicit the information, as to how frequently he experienced what he alleged to be "excruciating" pain during the time he was on light duty after his May 17 on-the-job injury.[8]

His credibility was also undermined by his failure to even mention on direct examination an important meeting he had with Pat Wolfe and Clement Ferraro on August 10, in which Wolfe asked him questions about his alcohol use, and Ferraro took down his answers. Only on cross-examination did Hubbard refer to its occurrence. Additionally, Hubbard testified that at the conclusion of that meeting, he was presented with the questions and his answers and asked to sign the form. He further testified that he read them before signing the form and that it contained nothing notating his comments that his diabetes affected the absorption rate of alcohol in his blood. The document contradicts him, saying Hubbard "stated diabetes causes alcohol to disipate [sic] very slowly."[9]

Hubbard also contracted himself at various points during his testimony; for instance, his testimony about the first time Williams came over to the production line and told him to stop "stacking down" rims. Hubbard first testified that this occurred before he had to leave the production line because of pain. He then testified, however, that he did not stack them down until after he returned to the line and found himself backed up. He may have confused this conversation with a second conversation he had on the subject with Williams but, if so, his recollection was faulty.

Hubbard also greatly understated the extent supervisors admonished him, and his responsibility for problems in his performance. Initially, when asked if he was ever disciplined, he replied that he was called to the office "maybe once," because he out put out some bad rims due to a defect in the ten spindle. However, it is patently clear from his later testimony, as well as that of his supervisors, that supervisors found fault with his performance or conduct on many occasions and told him so. As another example, when discussing an incident in which he let through wheels with improperly drilled holes, Hubbard first testified, "I didn't do anything wrong," but later testified that when supervisors brought the situation to his attention and said he would be written up the next time, he admitted to them that he had been wrong.

I also find exaggerated Hubbard's uncorroborated allegations of bouts of "excruciating" pain that immobilized him at work while he was on light duty following his May 17 injury. It is noteworthy that he missed only 2 days of work for medical reasons during this period (very shortly before his suspension on August 9), never saw a doctor for pain, and never had to receive medical treatment during a day that he was at work. I cannot believe that he would have been able to get through the work day if his testimony about the severity of his pain is credited.

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[8] Hubbard had three on-the-job injuries: the first during his training, in December 2003 or January; the second in February; and the third in May.

[9] GC Exh. 20. Despite having the opportunity, neither party provided reliable medical evidence at the hearing to either support or refute Hubbard's assertion, and I will not consider hearsay evidence, representations by counsel, or proffered evidence referenced in briefs. Therefore, I need not address the Respondent's Motion to Strike portions of the General Counsel's brief or the General Counsel's response thereto. Regardless, the fact remains that Hubbard's blood alcohol level was .020 or greater when he was tested and re-tested on August 9.

Finally, I observed that Hubbard seemed defensive and to avoid taking responsibility for his actions, supporting the testimony of the Respondent's witnesses that he displayed a resistant attitude toward directives and suggestions for improvement.

Because Hubbard was such an unreliable witness, I do not credit his testimony where it conflicted with that of managers and supervisors whom I find more credible. I note that the testimony of the various representatives of the Respondent was often substantially similar but not identical, leading me to believe that it was based on genuine recall and not scripted. For example, Ferraro testified that Hubbard related on August 10 that he had been drinking from noon until midnight, whereas Wolfe recalled that Hubbard told them his last drink was around 2:30 a.m. Nor did Hubbard's supervisors appear to be trying to slant their testimony to exaggerate the problems they had with his performance. In this regard, Anthony Tomsello testified that Hubbard on some occasions did "very well" in performing his cleaning assignments while on light duty after his May injury, and Williams testified that Hubbard did well in operating the Makino machine to which he was assigned for about a month and "extremely well" on a couple of occasions in performing cleaning assignments.

Turning to Hubbard's employment, he was hired on December 15, 2003, in the wheel production unit. He was trained on the first shift on operating the CNC drilling machine. During this training period, he suffered a work-related injury, as a result of which he was placed on light duty and his training period extended. In late January, he was transferred to second shift (3 to 11 p.m.) and assigned to operate the ten spindle machine under the supervision of Williams and Ferraro. Generally, there were and are four stations or steps on each production line: VBM machine, ten spindle prestress, mills, and boxing.

Williams testified that, as Hubbard's first-line supervisor, he observed Hubbard's work on a daily basis. He related that Hubbard had performance problems throughout his tenure. Williams recalled one incident shortly after Hubbard had began his job as a ten spindle operator when he was standing on the line with no rims on his pallet. Williams then instructed him to "up stack," a process used to put rims back into assembly so that productivity would not fall behind. Hubbard responded that he had physical limitations and was unable to lift heavy objects. Williams was not aware that Hubbard was still on light duty at the time, and there is no evidence that he was.

Hubbard suffered another on-the-job injury (lumbar strain) on about February 10, as a result of which he was once more placed on light duty, for the period from February 10 – 17.[10] After Hubbard was again released from light duty in February, he performed poorly on the ten spindle press, engaging in the practice of "down stacking" rims (taking rims off the conveyor belts and placing them on the skids so that less goes through the production line). Hubbard testified he had to do this because a very fast employee named Justin Kline was in the VBM station in front of him on the line. However, Kline was at the VBM for only 2–3 weeks during the period when Hubbard was on the ten spindle, and Hubbard's down stacking continued after Kline was replaced with a slower employee.

Hubbard also failed to comply with required safety measures. Thus, Anthony Tomsello, EHS coordinator, observed him on several occasions "scotch-briting" rims while the wheels were engaged in the equipment, a direct violation of the company safety manual and a practice Hubbard testified he knew was dangerous. When Tomsello brought this to Hubbard's attention,

[10] See R. Exh. 6.

Hubbard assured him it would not happen again. Tomsello wrote up notes of the incident.[11] Hubbard and the Saunier brothers testified rather incredibly that they were trained to engage in this unsafe practice and that it was conducted on a routine basis. In light of the Company's potential liability in the event of industrial accidents, I find this hard to believe.

Williams observed that Hubbard continually reported late to his work area, both at the beginning of his shift and after breaks, and also left the line early for breaks. Williams told him that this resulted in lost production for the Company; when he did not report on time, rims piled at the ten spindle and forced him to down stack, impeding workers further down the line from performing their jobs adequately.

Hubbard was also responsible for serious performance failures affecting the whole production line. On one occasion in February, Hubbard consecutively produced 25 or 26 defective rims because he failed to observe that the rims were not being drilled properly. None of the rims could be salvaged.

On another instance in March, a boxer working down the line reported to Williams that all rims coming off the line had nicks caused by the ten spindle that Hubbard was operating. Because of this, the boxer had to sand each rim, thereby decreasing his productivity. Hubbard admitted to Williams that he had failed to do a visual inspection of the rims as they came down the line.

On about March 14, Williams prepared a 90–day review for Hubbard.[12] Williams rated Hubbard's performance as failing to meet expectations in 12 of 15 categories and recommended to HR that Hubbard be terminated. However, the HR director at the time, who was later discharged for performance problems of his own, took no action on the review and did not respond to Williams' subsequent queries about its status. When Wolfe took over as acting HR director in approximately the third week of June, she went through employee reviews that were still pending in HR and determined that Hubbard's was too out of date to be presented to him, since he had worked another 3 months after its preparation.

During his second 90 days of employment, Hubbard's performance problems persisted. Ferraro, the new shift supervisor, continually observed Hubbard accumulating rims in his work area. Williams testified to two separate occasions when he observed Hubbard down stacking rims. When prompted for a reason in both instances, Hubbard explained that he was having mechanical problems with the machine. Williams checked the machine and found no operational reasons for the slowdown and instructed Hubbard to up stack so that production could reach a normal rate.

In April, Tomsello observed Hubbard working in the boxing station without the use of a hoist to lift the wheels. Tomsello warned Hubbard that lifting wheels without the aid of the hoist was a safety violation. Hubbard acknowledged that he understood and replied that he would use the hoist in the future. On April 22, Tomsello once again observed him lifting wheels without the aid of a hoist. Tomsello cautioned that failure to follow safety procedures could result in disciplinary action. Tomsello documented these incidents.[13] Hubbard's testimony that

[11] R. Exh 7.

[12] R. Exh. 10. Williams did not prepare a 60-day review for him because Hubbard's training period had been extended through approximately the first six weeks of his employment.

[13] R. Exh. 8. See R. Exhs 4 & 5, safety presentations made at new employees' orientation that reference hoist use .

he did not use hoists because none were working was contradicted by Harry Saunier, who testified that in the June to August time period, employees on the line used them.

On May 17, Hubbard suffered a third on-the-job injury (abdominal wall injury). This resulted in his once again being placed on light duty restriction, from May 17 until the date that he was suspended, August 9.[14] His main duties were to clean the work areas and wipe down rims after production. Tomsello and Williams observed that he often did not complete these jobs satisfactorily. Williams testified that Hubbard did "a lot of standing around" and sometimes talked to persons who were working. On at least one occasion, Williams told him not to be standing by a co-worker and interfering with her work. Williams also admonished him "continuously" for not wearing his safety glasses while in the work area, another safety violation.[15]

Williams prepared Hubbard's 6–month employee review in June.[16] Once again, William rated Hubbard as failing to meet expectations in 12 out of 15 categories. The review was adopted by management and reviewed by Wolfe who, on July 5, met with Hubbard to discuss it. Hubbard basically denied everything that was negative (he testified that he told her that none of it was true). Wolfe stated that the best plan of action would be to place him on a PIP.[17] She explained that if he failed to make progress while on the PIP, he could face disciplinary action up to and including termination. She then asked Hubbard to review the PIP prior to their next meeting.

Later that day, Hubbard protested his evaluation to Dan Saunier, in the latter's capacity as union representative. Saunier set up a meeting that day between them and Plant Manager Bruce Henderson. There, they discussed Hubbard's work. Saunier testified that as he was leaving the office (after Hubbard had gone), Henderson told him, "Don't fall on the sword, over Greg Hubbard." Saunier claims that he took the remark as a threat that if he continued to represent Hubbard, it could eventually cost him his job, but the General Counsel has not alleged this as an 8(a)(1) violation.

Henderson's account was markedly different. He testified that after Hubbard left the room following the meeting, Saunier closed the door and said, "Hubbard is no good. He deserves to be fired. You know it, the Company knows it, and the people on the floor know it. And when he's fired, most people will be happy."[18] Henderson replied, "I wouldn't want to fall on my sword either."

I credit Henderson's version. Saunier in general was not a credible witness, and I find more plausible Henderson's account of the circumstances in which the remark about "falling on the sword" was made. First of all, it seems unlikely that Henderson would come out with the comment sua sponte. Secondly, Saunier did not deny making the statements about Hubbard attributed to him by Henderson or otherwise directly contradict Henderson's version of the conversation immediately preceding the remark.

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[14] See R. Exh. 6.

[15] See R. Exh. 4, stating that "Personal protective equipment must be worn at all times."

[16] GC Exh. 17.

[17] GC Exh. 5.

[18] Tr. 358-359.

On August 5, Wolfe presented Hubbard with a revised copy of the PIP.[19] Wolfe and Ferraro offered suggestions on how Hubbard could improve his performance at the plant. Once again, Hubbard voiced disagreement with the negative findings on the review, and he subsequently refused to sign it. After again explaining the PIP process, Wolfe scheduled a follow-up meeting in 2 weeks.

On August 9, when Hubbard reported to work, he presented Ferraro paperwork from his doctor releasing him from light duty work restrictions. Ferraro smelled a strong odor of alcohol on Hubbard's breath. He did not tell this to Hubbard but rather instructed him to go onto the production floor and wait for an assignment.

Ferraro immediately informed Williams and Tomsello that he believed Hubbard might be under the influence of alcohol on the job. Each subsequently encountered Hubbard and detected the scent of alcohol on his breath. Pursuant to the Company's drug and alcohol policy, Tomsello informed Hubbard that he was required to submit to drug/alcohol testing based on "reasonable suspicion" and escorted him to the front offices, where a nurse was conducting random drug and alcohol tests.[20]

Hubbard's readings from the Breathalyzer came to .026 and .020, on re-testing.[21] Tomsello reported these findings to Wolfe and other management officials, who determined that Hubbard should be suspended indefinitely pending further investigation. As per company policy, Hubbard's work locker and car were searched for drugs and alcohol. None was found.

Hubbard returned the following day, August 10, for a meeting with Wolfe and Ferraro, during which he was asked a series of questions regarding his alcohol use. On cross-examination, Hubbard conceded that he told them he had engaged in an "all day drink fest" drinking beer with a couple of friends until midnight. He also told them that diabetes did not allow his body to metabolize alcohol quickly, causing it to remain in his blood longer, and this might have been the reason for his positive Breathalyzer test. He volunteered to enter the Company's EAP program, for alcohol counseling.

On August 12, however, Wolfe, Henderson, and other management officials decided to terminate Hubbard because of his positive alcohol test against a background of being on a PIP and having a record of poor performance. The following day, Ferraro notified him of his discharge.

8(a)(1) allegations concerning Supervisor Williams

The sole witnesses in support of these allegations were Dan and Harry Saunier. Neither was a credible witness.

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[19] GC Exh. 6.

[20] Dan and Harry Saunier were among the employees selected for random testing that day. Their selection has not been alleged as an unfair labor practice, and I decline to draw any inferences against the Respondent because of the coincidence that Hubbard ended up being tested on the same day.

[21] GC Exh. 11. The form states that it was a random test, a fact raised by the General Counsel in arguing against the credibility of the testimony of Ferraro, Tomsello, and Williams that they smelled alcohol on Hubbard's person. I credit their testimony, but in any event, the test results showed that Hubbard did have alcohol in his system of .20 or greater.

Most damaging to both was their impeachment by prior inconsistent statements in their NLRB affidavits and, even more, by the way they attempted to blame the Board agents for the discrepancies.

Thus, Dan Saunier first testified that Tomcello told only employees in the boxing station to use the hoist. In his affidavit, however, he stated that Tomcello "told us many times, during the campaign, to use the hoist and not lift the wheels or we would be terminated."[22] This was consistent with Harry Saunier's testimony on the subject but not with Hubbard's.

When the Respondent's counsel showed him his affidavit, he confirmed it was his signature but said, "I don't work production. Why would I say this?"[23] When then asked why he did, Saunier replied, "I must not have read this over carefully" and later said, "This is not something I said."[24] In other words, the Board Agent supposedly put words in his mouth, and he failed to detect the error. Saunier appears to have been tailoring his testimony on this point to help Hubbard's case. In the process, however, he only undermined his own credibility.

Harry Saunier also appeared at one point to be tailoring his testimony, to conform to his brother's. This concerned an alleged conversation they had with Williams on June 15, the day of the election. Dan Saunier, who was called first as a witness, testified that the conversation occurred about half an hour after the election (polling end at circa 4 p.m.), placing it at about 4:30 p.m. Harry Saunier later testified that the conversation occurred at about 5:15 p.m.

However, in his affidavit, he stated that it took place over 2 hours after the election, or sometime after 6 p.m. He explained that the time stated in his affidavit was a mistake, because he meant it was over 2 hours after the start of the election. It is not logical that he would have used the start of the election, rather than its conclusion, as the point to measure the time of the conversation. Incredulously, he testified that he saw the error when reading his affidavit and pointed it out to the NLRB agent. Yet, purportedly, the agent ignored what he said and did not correct the error, and Saunier signed the affidavit anyway. I find this unbelievable,

It is also significant that, aside from the time, the Saunier brothers gave conflicting versions of the conversation they allegedly had with Williams on June 15. Thus, Dan Saunier stated that after the election results were announced, Williams walked up to them in front of the lunch room and, in a heated manner, told them they would never see a contract and would be terminated before they saw one. Harry Saunier, on the other hand, testified that he initiated the conversation with Williams by asking when he would be taken off boxing machines and trained on other equipment. Williams replied that he would stay on the boxing machines because there was no one to replace them. Harry Saunier then said that was why he had voted for the Union. Williams responded that the Respondent knew he and Dan were for the Union and that they would never see a contract.

Williams denied that any such conversation took place. He testified that supervisors received training concerning proper conduct, communication with employees, and rules during the preelection period and the election. As a result, he consciously avoided the Saunier brothers—known as leading union adherents—to prevent any potential problems. On the day of the election, salaried employees were given strict instructions to stay away from the employees

[22] Tr. 135.
[23] Ibid.
[24] Tr. 135-136.

and the team room (where Williams usually conducted his business and where the union vote was taking place). Therefore, he took his work to the supervisors' office across the plant where he remained with Ferraro until well after the election was finished (3–4 hours). After hearing of the union victory, he never left the office because he wanted to let the workers "have their fun." Ferraro corroborated Williams' testimony that they spent the afternoon together in the supervisors' office.

I credit Williams' corroborated account over the inconsistent versions of the Saunier brothers. I also conclude it implausible that, having received management training on how to conduct himself vis-à-vis the Union, Williams would have made threatening remarks on the day of the election. Therefore, I do not find that Williams made any threats to the Saunier brothers on June 15.

Dan Saunier also testified that on June 21, on the plant floor, he overheard Williams tell Ferraro, in the presence of an unidentified employee, that Wolfe had a list of names of people who were involved in the Union who were going to be terminated. According to Saunier, Williams specifically named him, his brother, and several other employees.

I find such testimony farfetched and not plausible for several reasons. First of all, it does not make sense that Williams, a lower level supervisor than Ferraro, would have been more privy to management operations than his superior. Further, it strikes me as unbelievable that Williams would have made such statements on the plant floor, with an employee in the immediate vicinity, when Williams could have spoken to Ferraro in private in the supervisors' office. Supervisors had received management training, and I cannot believe that, even had such a list existed, Williams would have been so blithely unaware of the potential consequences of speaking about it in the presence of employees. On the other hand, if Williams intended that employees hear what he said, it makes no sense that he would have spoken on the production floor, where there was a high noise level. Finally, Saunier's claim that Williams read off names of various employees sounds concocted.

The unidentified employee did not testify. Williams and Ferraro denied that they had any such conversation, and I credit them over Saunier, who was not a credible witness on this matter or in general. In light of this conclusion, I need not make any determination on whether the level of noise at the time would have prevented Saunier, who was about 15 feet away from them and wearing noise protection, from overhearing what they were saying.

Finally, Dan Saunier testified that about a week before the election (on about June 8), he had a conversation with Williams concerning the upcoming vote. Saunier could not recall how the conversation started but alleged that during its course, Williams stated that the Union's efforts were futile and that by his count, the Union had only10 "yes" votes out of a possible 45 workers on the second shift. Saunier replied that they would see on the day of the election. According to Saunier, two other co-workers, with the first names of Tina and Dirk, were present. The General Counsel failed to call either of them as witnesses, and Williams denied that such a conversation took place.

Due to reasons stated earlier, Saunier was not a credible witness and in the absence of any corroboration, I credit Williams' denial and do not find that he made such alleged statements. Assuming he did, Saunier's failure to recall the whole conversation robs the statements of context and precludes the ability to determine whether, in all the circumstances, they were coercive of employees' rights.

Hubbard's termination

The framework for analysis is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

If the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F. 3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F. 3d 666, 670 (7th Cir. 1998).

The General Counsel asserts that Hubbard was terminated because of his union activities and sympathies and not because of his poor performance or positive alcohol test. It contends that the Company was aware that Hubbard was a union activist and that his job was not in jeopardy until after the Union was victorious on June 15.

Although Hubbard and Dan Saunier were not credible witnesses in general, I will assume that Hubbard engaged in union activity at the facility and that this was known by at least some members of management/supervision.

As to the element of animus, I have not found any independent 8(a)(1) violations, and there is no direct evidence of animus toward Hubbard. The General Counsel essentially contends that circumstantial evidence supports the conclusion that Hubbard's termination was the result of hostility toward him for his union activities. First, the General Counsel claims that the Company treated Hubbard differently from other employees because he did not receive performance reviews when scheduled. Related to this, the General Counsel questions why Hubbard remained employed at the Company so long when his job performance clearly did not meet acceptable standards.

However, for much of his employment, Hubbard was on light and not full duty, due to three on-the-job injuries, and the Respondent provided legitimate justification for its failure to give Hubbard his 60- or 90-day reviews. As to the former, most of Hubbard's first 2 months of employment was spent in training and not under Williams' supervision. Regarding the latter, the HR director at the time was apparently derelict, and by the time Wolfe took over the position, the review was outdated.

For those reasons, I do not conclude that the Respondent's failure to present Hubbard with 60- or 90-day reviews or its retention of him despite his poor performance raise any suspicion of unlawful motivation. On the contrary, the Respondent seemingly went out of its way to accommodate Hubbard and to afford him ample opportunities to improve. It is noteworthy that some employees who have received unfavorable reviews have been discharged without being given the chance to improve through a PIP.

The General Counsel also points out that another employee registering a much higher Breathalyzer reading was suspended until the next scheduled duty period and allowed to return and enroll in a counseling program. However, the employee in question had been with the company for 26 years and had a good work record, unlike Hubbard. The handbook expressly states that an alcohol blood reading of .20 or greater can lead to disciplinary action up to and including termination, and Wolfe credibly testified that Hubbard's positive alcohol test results were considered in the context of his being on a PIP and his poor work performance in making the decision to discharge him.

I further note that the leading union adherents prior to the election are all still employed, and the General Counsel has not alleged any acts of discrimination against them or any other employees besides Hubbard.

In light of the above, I conclude that the General Counsel has failed to establish the element of animus, either by direct or circumstantial evidence and, therefore, has not made out a prima facie case that Hubbard was unlawfully discharged.

Assuming that this burden was met, I conclude that the Respondent has successfully rebutted any presumption that Hubbard was terminated for union activity by showing that it would have terminated him even in the absence of that activity.

Hubbard had serious performance problems throughout his employment, as reflected by his being rated unsatisfactory in 12 out of 15 areas in both his 90–day and 6–month reviews. He suffered three on-the-job injuries, was on light duty during much of his employment and, despite being given opportunities to improve his performance, did not do so. Even in the absence of Hubbard's testing positive for alcohol use on August 9, the Respondent would have had good cause for terminating his employment based on his work record.

Turning to his testing positive for alcohol on August 9, by his own admission, Hubbard drank beer with his friends for most of the preceding day, until midnight. Regardless of whether his diabetes affected the alcohol absorption rate in his blood, such conduct the day before a workday must be deemed to have been imprudent, particularly when he was on a PIP and on actual notice of the Respondent's strict policy toward alcohol and drugs. There can be no dispute that his blood alcohol level on August 9 clearly violated the Company's rules, which expressly provided that discipline as severe as termination could be imposed.

I conclude that the Respondent's proffered grounds for Hubbard's termination—his testing positive for alcohol, in the context of his being a short-term employee on a PIP for poor performance—were the real reasons for the decision to discharge him.

Accordingly, I further conclude that under a *Wright Line* analysis, the Respondent's termination of Hubbard on August 13, 2004, did not violate Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent has not engaged in any unfair labor practices under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 18, 2005.

Ira Sandron
Administrative Law Judge

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.